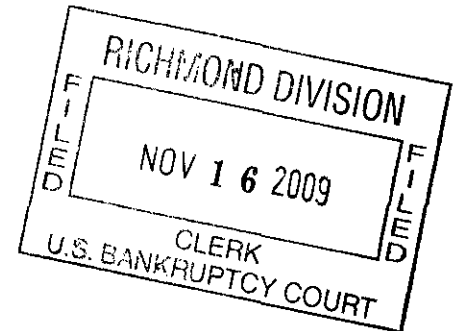


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Hearing date: November 23, 2009, at 10:00 a.m.
Response deadline: November 16, 2009, at 4:00 p.m.



**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA**

In re:

CIRCUIT CITY STORES, INC., et al.,

DEBTORS

Chapter 11

Case No. 08-35653 (KRH)

(Jointly Administered)

**OBJECTION BY COMMISSIONER OF MASSACHUSETTS DEPARTMENT OF
REVENUE TO CONFIRMATION OF FIRST AMENDED JOINT PLAN OF
LIQUIDATION OF CIRCUIT CITY STORES, INC. AND ITS AFFILIATED DEBTORS
AND DEBTORS-IN-POSSESSION AND ITS OFFICIAL COMMITTEE OF
CREDITORS HOLDING GENERAL UNSECURED CLAIMS**

TO THE HONORABLE KEVIN R. HUENNEKENS, UNITED STATES BANKRUPTCY
JUDGE:

NOW COMES Navjeet K. Bal, as she is Commissioner of the Massachusetts Department of Revenue (hereinafter, "MDOR"), a creditor and party in interest in the above-captioned matter, and pursuant to, *inter alia*, the provisions of 11 U.S.C. §§ 1128 and 1129, and in accordance with Federal Rules of Bankruptcy Procedure Rule 3020, objects to the confirmation of the *First Amended Joint Plan of Liquidation of Circuit City Stores, Inc. and its Affiliated Debtors and Debtors-in-Possession and its Official Committee of Creditors Holding General Unsecured Claims* (hereinafter, the "Plan"). In support thereof, MDOR states the following:

I. PRIOR PROCEEDINGS

1. On November 20, 2008, the debtor, Circuit City Stores, Inc. and several of its

affiliates (hereinafter, the "Debtors"), filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code (the "Petition Date").

2. Since the Order for Relief, the Debtors have continued to conduct the affairs of the estates as debtors-in-possession, and consequently they have held the powers and obligations of a trustee, except as otherwise expressly limited by the terms of the Bankruptcy Code.

3. The court has set a hearing date of a hearing date on the confirmation of the Plan for November 23, 2009, and an objection deadline pertaining thereto of November 16, 2009. Consequently, the present objection is timely filed.

4. Since the commencement of the case, MDOR has filed various proofs of claim, primarily for corporate and sales taxes. Based upon the most recently filed amended proof of pre-petition claims, MDOR holds at least the following claims:

- a) an unsecured priority claim in the amount of \$5,946,369.79 and a general unsecured claim in the amount of \$529,535.16 in the case of *In re Circuit City Stores, Inc.*, Case No. 08-35653 (proof of claim no. 12949) consisting of the following: audit assessments for additional corporate excise taxes for the years ending February 28, 2005 and February 28, 2006 assessed on or about November 28, 2008 in the tax and pre-petition interest amounts of approximately \$1,236,076.21; audit assessments for additional sales taxes for periods running from January 1, 2005 through November 2008 assessed on various dates in April 2009, in the aggregate tax and pre-petition interest amounts of approximately \$397,785.11; and estimated amounts for pending audits of the Debtors' corporate excise tax returns for the years ending February 28, 2007 and February 29, 2008 for the balance of the claim (hereinafter, the "MDOR Stores Claim"); and

b) an unsecured priority claim in the amount of \$3,359.57 in the case of *In re Circuit City Purchasing Company, Inc.*, Case No. 08-35657 (proof of claim no. 12953), which consists of audit assessments for additional sales taxes for periods from March 2005 through November 2008 assessed on or about April 12, 2009 (hereinafter, the “MDOR Purchasing Claims”, and together with the MDOR Store Claim, the “MDOR Claims”).

II. GROUNDS FOR OBJECTION

5. In order to confirm a plan under Chapter 11, the Bankruptcy Court must find that both the proponent and the plan comply with the applicable provisions of the Bankruptcy Code. 11 U.S.C. § 1129(a)(1) & (2). In this instance, the Debtors are the Plan’s proponents.

6. As amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Section 1129(a)(9)(C) of the Bankruptcy Code establishes as one of several prerequisites for confirmation of any chapter 11 plan that the plan (if it does not provide for payment in full of the claim on the effective date or the holder does not agree to other treatment) must provide that the holder of a priority tax claim with:

regular installment payments in cash -

(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b))....

7. In order to obtain the total value over time equaling the allowed amount of the priority tax claim, the plan must provide for the payment of interest to the holder on that claim. How the interest rate is to be determined is governed by Section 511 of the Bankruptcy Code,

which directs that:

(a) If any provision of this title requires the payment of interest on a tax claim or on an administrative expense tax, or the payment of interest to enable a creditor to receive the present value of the allowed amount of a tax claim, the rate of interest shall be the rate determined under applicable nonbankruptcy law.

(b) In the case of taxes paid under a confirmed plan under this title, the rate of interest shall be determined as of the calendar month in which the plan is confirmed.

8. The formula for determining the interest rate for any underpayment of

Massachusetts state taxes is contained in Mass. Gen. Laws chapter 62C, section 32(a), which provides that

Taxes shall be due and payable at the time when the tax return is required to be filed, determined without regard to any extension of time for filing the return. If any amount of tax is not paid to the commissioner on or before its statutory due date, there shall be added to the tax interest at the rate of the Federal short-term rate determined under section 6621(b) of the Internal Revenue Code, as amended and in effect for the taxable year, plus four percentage points, compounded daily.

9. On September 10, 2009, MDOR promulgated *Technical Information Release 09-17: Interest Rate on Overpayments and Underpayments*. In that release, MDOR announced that it has determined that the interest rate on the underpayment of Massachusetts taxes for the fourth quarter of 2009 shall be five percent (5%) per annum, compounded daily. The present anticipation is that the confirmation of a plan in this case would occur in that quarter.

10. The interest rate on priority unsecured tax claims proposed by the Plan is inadequate to provide "a total value, as of the effective date of the plan, equal to the allowed amount of such claim," and ignores the requirements set by Section 511 of the Bankruptcy Code. In addition, the Plan expressly provides that payments towards priority unsecured tax claims may not actually be made, or if they are to be made then possibly only sporadically.

11. Article III(A)(2) of the Plan provides for the treatment of allowed priority tax claims, and states that:

Except to the extent that an Allowed Priority Tax Claim has been paid prior to the Distribution Date, a Holder of an Allowed Priority Tax Claim shall be entitled to receive, to be paid out of the Liquidating Trust, in full and final satisfaction, settlement and release of and in exchange for such Allowed Priority Tax Claim, (i) regular installment Cash payments, occurring not less frequently than quarterly over a period not exceeding five (5) years after the Petition Date, in an aggregate principal amount equal to the unpaid portion of such Allowed Priority Tax Claim, plus interest on the unpaid portion thereof at the Case Interest Rate from the Effective Date through the date of payment thereof or (ii) such other treatment as to which such Holder and the Debtors and/or the Liquidating Trustee shall have agreed upon in writing; provided however, that the Liquidating Trustee shall have the right to pay any Allowed Priority Claim, or any remaining balance of any Allowed Priority Tax Claim, in full at any time or after the Effective Date without premium or penalty. Notwithstanding the foregoing, or anything contrary in the Plan, no Distributions shall be made to the Holder of any Allowed Priority Tax Claims unless (a) the Liquidating Trust has sufficient Available Cash to pay, or reserve for, as the case may be, the Face Amount of all Administrative Claims; and (b) either (i) the Liquidating Trust has sufficient Available Cash to pay, or reserve for, as the case may be, the Face Amount of all Priority Tax Claims or (ii) the Liquidating Trust Oversight Committee consents to all or any portion of such Distributions¹.

12. Article I(B)(1.15) of the Plan defines the term "Cash Interest Rate" as "the federal judgment rate provided in 28 U.S.C. § 1961 in effect on the Petition Date, which is 1.12%."

13. The Plan cannot be confirmed as it does not provide holders of allowed priority tax claims with interest at a rate required under the Bankruptcy Code.

14. The Bankruptcy Code's requirement as a condition for the confirmation of any plan under chapter 11 that the amount paid on an allowed priority tax claim must be of a value as of the effective date of its allowed amount includes the requirement that in the cases of a disputed claim the finally allowed amount of a priority tax claim must also be paid interest (under the rate determined through Section 511) from the effective date, and not the date of allowance. Anything that provides the holder of the (finally) allowed priority tax claim less than

¹ This paragraph also appears verbatim in the Plan in Section III.A.2.

that does not comply with Section 1129(a)(9)(C) of the Bankruptcy Code. While it may be permissible for other types of claims, the provision contained in Article VI.F of the Plan cannot be applied or otherwise followed in the context of allowed priority tax claims, and in the absence of recognition of this either within a modified plan or the confirmation order, the Plan should not be confirmed.

15. While Article III(A)(2) of the Plan provides for regular payments to holders of allowed priority tax claims that with the exception of the interest deficiency complies with the Bankruptcy Code, the “notwithstanding” portion of that section conditions those payments upon the availability of funds. This is rather disconcerting. If a plan does not have the funds available to make the minimum distributions required for the confirmation of a chapter 11 plan – including the payment of the full amount of an allowed priority tax claims and in the manner required by the Bankruptcy Code - the plan does not meet the minimum requirements for confirmation. If in fact this estate is not sufficiently funded for a plan to meet its payment obligations under Section 1129(a)(9) of the Bankruptcy Code, then alternatives to chapter 11 should be seriously considered.

16. After nearly four years after the effective date of BAPCPA, plans that provide for priority tax claims in the manner required by the Bankruptcy Code have become rather standardized. The plan section properly treating this type of claim generally provides as follows, and a modification of the Plan along these lines would be as Congress intended:

Priority Tax Claims. Allowed Priority Tax Claims shall be (i) paid in full on the Effective Date; (ii) paid in full in deferred equal [monthly or quarterly] cash payments over a period of up to five (5) years from the Petition Date as permitted under Section 1129(a)(9) of the Code, together with interest thereon at the rate(s) determined in accordance with Section 511 of the Code for each such claim as of the calendar month in which the Plan is confirmed; or (iii) shall be paid in full in accordance with such other arrangements as may be made between the taxing authorities entitled to such payment and prior to the Effective Date the Debtors and thereafter, the Liquidating Trustee.

In the case of a priority tax claim that may be disputed, the finally allowed amount of the claim shall also have accrued on it interest at the rate(s) determined in accordance with Section 511 of the Code from the Effective Date up to the time when the claim was allowed in whole or in part, and thereafter shall be paid in full at that time, or in accordance with any either option (ii) or (iii) as set forth above.

17. Article X.D (D) of the Plan purports to permanently enjoin “all Persons who have held, hold or may hold Claims against or Interests in the Debtors... [from] asserting a setoff, right of subrogation, or recoupment of any kind against any debt, liability, or obligation due to the Debtors, except as set forth in Article VI.H.2. of the Plan....” While Article VI.H.2.1 permits the Debtors and later the Liquidating Trustee to assert or not to assert any right of setoff that they may hold, Article VI.H.2.2 limits the assertion by a non-debtor of any setoff rights, rights of subrogation or recoupment of any kind at the time that it answers an Estate Claim or if and when it may do so under Fed. R. Civ. P. Rule 15 or Fed. R. Bankr. P. Rule 7015.

18. An essential component of tax administration, especially in the context of a multi-year audit examination of a corporation’s returns, is the re-determination as necessary of taxable income and allowable deductions or credits, which may generate provisional tax overpayments and underpayments which are then netted within a particular period and the examined period(s) as a whole. In the bankruptcy context, this process of accounting has been characterized as “recoupment” and has been found not to be prohibited by any provision of the Bankruptcy Code. *See, e.g., Pettibone Corp. v. United States* 34 F.3d 536 (7th Cir. 1994); *In re Coastal Bus. and Equip. Sales*, 330 B.R. 328 (Bankr. D. Mass. 2003). As this process is within the core of the assessment process, it would also be exempt from the automatic stay through Section 362(b)(9) of the Bankruptcy Code.

19. Moreover, as a general matter, the Bankruptcy Code through Section 553 setoff rights survive bankruptcy and are not affected by any other section of the Code. *IRS v. Luongo (in re Luongo)*, 259 F.3d 323 (5th Cir. 2001); *In re DeLaurentiis Entertainment Group, Inc.*, 963 F.2d 1269, 1277 (9th Cir. 1992).

20. Superficially at least, Article X.D (D) appears to impermissibly impair the set off and recoupment rights of the taxing authorities that are recognized by the Bankruptcy Code, and that impairment might extend so far as to interfere with core principles of tax administration (which could also easily be to the detriment of the estate as to its benefit) . No grounds have been articulated and certainly none have been established that could grant the proponents and the Plan the injunctive relief requested as it appears that it could be applied to the taxing authorities. Such relief in that context would also be inconsistent (if not contradictory) with the Bankruptcy Code and might inappropriately abrogate also the duties imposed upon first the Debtors and then the Liquidating Trustee through 28 U.S.C. § 959 and 960.

21. Article V.E.5(c) of the Plan requires the Liquidating Trustee to file final Federal, state and, if applicable, local, tax returns of the Debtors. While a reasonable liquidating trustee should understand that his duty would extend to the payment of the taxes from trust assets (which under Massachusetts law would include the original tax but any interest or penalties), the addition of requiring that the taxes be paid by the Liquidating Trustee from the trust assets would easily avoid the potential of future controversy.

22. At least a portion of the MDOR Claim consists of trust fund taxes that also, under Massachusetts law, may give rise to separate assessments against persons other than the original taxpayer that are determined in accordance with Massachusetts law to have been under “a duty to pay,” which in lay terms, to be held liable as a “responsible person”. The determination process

is a fact-directed one and in the context of this case as it frequently is other proceedings facts and events that may have occurred after the petition date may identify and establish the duty of the persons responsible for the pre-petition trust fund taxes at issue. While all of an allowed priority tax claim would be a tax liability, it is not all of the tax liability. The allowed priority tax claim consists of the original unpaid tax amount and accrued interest up to the petition date (as allowed by, as appropriate, the Debtors, the Plan's "Responsible Person", or the court), it does not include post-petition interest, statutory penalties (which would be a general unsecured claim), any non-determined disallowed portion of the tax or pre-petition interest, and any interest differential between the Section 511 interest rate and future interest rates.

23. While it is short of explicit, the exculpation and limitation of liability provisions of Article X.G, and in particular, (ii), might in some constructions impair the administration and application of the Massachusetts tax laws in the matter of the determinations and assessments of persons other than the Debtors for the pre-petition trust fund taxes (and similarly, other governments in the administration of their tax laws). Such impair is far beyond what the Bankruptcy Code would permit, and is prohibited by the Tax Injunction Act (28 U.S.C. § 1341) simply states:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection under State law where a plain, speedy and efficient remedy may be had in the courts of such State².

24. While there does exist a "bankruptcy exception" through specific provisions of the Bankruptcy Code (for example, Section 505), it is limited to the debtor itself³. Moreover, the conditions for the imposition of special equitable relief for third parties has not and in the context

² Massachusetts provides a "plain, speedy and efficient remedy" through the provisions of M.G.L. c. 62C, § 39 and c. 58A, §§ 1, *et seq.*, with judicial review to be had to the Appeals Court and the Supreme Judicial Court.

³ The most essential bankruptcy exception, the bankruptcy court's discretion to determine a tax, is limited to only the debtor and does not extend to the tax liability of a non-debtor, even when the liabilities are closely related. *See*,

of this case cannot be established. *See, e.g., Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 141-142 (2nd Circuit 2005)(decided on other grounds)(“No case has tolerated nondebtor releases absent the finding of circumstances that may be characterized as unique.”); *In re Master Mortgage Investment Fund, Inc.*, 168 B.R. 930 (Bankr. W.D. Mo. 1994); and *In re M.J.H. Leasing*, 328 B.R. 363 (Bankr. Mass. 2005).

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WHEREFORE, Navjeet K. Bal, as she is Commissioner of the Massachusetts Department of Revenue, respectfully requests that this Honorable Court deny confirmation approval of the *First Amended Joint Plan of Liquidation of Circuit City Stores, Inc. and its Affiliated Debtors and Debtors-in-possession and its Official Committee of Creditors Holding General Unsecured Claims*; and enter an order for such other relief as the Court deems proper and just.

Respectfully submitted,

Dated: November 13, 2009

**NAVJEET K. BAL
COMMISSIONER
MASSACHUSETTS DEPARTMENT OF
REVENUE**

By her attorneys,

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**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA**

In re:)	Chapter 11
)	
CIRCUIT CITY STORES, INC., et al.,)	Case No. 08-35653 (KRH)
)	
DEBTORS)	(Jointly Administered)
)	

CERTIFICATE OF SERVICE

I, Stephen G. Murphy, hereby certify that I have this day served a copy of the within OBJECTION BY COMMISSIONER OF MASSACHUSETTS DEPARTMENT OF REVENUE TO CONFIRMATION OF FIRST AMENDED JOINT PLAN OF LIQUIDATION OF CIRCUIT CITY STORES, INC. AND ITS AFFILIATED DEBTORS AND DEBTORS-IN-POSSESSION AND ITS OFFICIAL COMMITTEE OF CREDITORS HOLDING GENERAL UNSECURED CLAIMS, electronically upon filing, and by first class mail, postage prepaid, upon the parties or persons appearing on the accompanying SERVICE LIST.

// s // Stephen G. Murphy
Stephen G. Murphy, Esquire
Dated: November 13, 2009

SERVICE LIST

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Chapter 11, Case No. 08-35653 (KRH)**

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